

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM MAGRUDER,)	
)	
Plaintiff)	
)	
v.)	Civil No. 99-0077-B
)	
ANTHONY SAWYER,)	
)	
Defendant)	

RECOMMENDED DECISION

Defendant Anthony Sawyer filed an Answer in this matter on March 22, 1999, setting forth a three-count Counterclaim. Plaintiff/Counterclaim Defendant Magruder moves to dismiss Count I and so much of Count II as purports to state a claim for a violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. 205A-214. For the following reasons, the undersigned hereby recommends the Motion to Dismiss Counts I and II of the Counterclaim (docket no. 4) be DENIED.

Factual Background

Anthony Sawyer and his fiancée, Christine Anderson, paid to attend a party held on property owned by William Magruder. During the party, it is alleged that Anderson was physically assaulted by other party goers, and Magruder himself, and that Sawyer witnessed the assaults and ultimately intervened to prevent further injury to Anderson.

Count I – Negligent Infliction of Emotional Distress.

Magruder asserts that Sawyer may not maintain an action for negligent infliction of emotional distress in this case because, as an “indirect victim” of the alleged negligence, Sawyer must allege that he and the direct victim have a “family relationship.” Magruder Memo. at 2-3. Magruder misstates the law. The Maine Law Court has held that an indirect victim may recover for negligent infliction of serious emotional distress when the mental distress was foreseeable. *Culbert v. Sampson’s Supermarket*, 444 A.2d 433, 438 (Me. 1982). Foreseeability turns on whether the indirect victim “was present at the scene of the [incident], suffered mental distress as a result of observing the [incident] and ensuing danger to the victim, and was closely related to the victim.” *Id.* The Law Court has never had the occasion to address whether persons engaged to be married are “closely related” within the meaning of the rule, but it has held that married persons qualify. *Nelson v. Flanagan*, 677 A.2d 545 (Me. 1996). In addition, the Law Court has cautioned that the factors it has adopted “should not be applied formulistically to bar arguably valid claims” that are instead better left for a jury’s determination. *Culbert*, 444 A.2d at 437. Accordingly, I recommend Magruder’s Motion to Dismiss Count I of Sawyer’s Counterclaim be DENIED.

Count II – Breach of Contract and Violation of the Maine Unfair Trade Practices Act.

Magruder moves to dismiss so much of Count II as purports to state a violation of the Maine Unfair Trade Practices Act [“UTPA”], 5 M.R.S.A. §§ 205A-214. The grounds for the Motion are that Sawyer has not sought restitutionary relief, in Magruder’s view, the only measure of relief available under the UTPA. Magruder ignores, however, a 1991 amendment to the UTPA providing for “actual damages” in addition to “restitution and . . . such other equitable relief.” 5 M.R.S.A. § 213(1). Sawyer’s allegation in Count II of the Counterclaim is that Sawyer and Anderson paid to attend the party, and that Magruder misrepresented that the property was reasonably safe and that the party would be operated in a reasonable and appropriate manner.¹ Sawyer has therefore satisfied the requirement that he show a loss, in this case the entrance fee, resulting from the misrepresentation. *See, Mariello v. Giguere*, 667 A.2d 588, 590 (Me. 1995) (addressing the pre-amendment version of section 213, but noting that the new version would require only an allegation of loss to the victim). In light of the fact that actual damages are available under the UTPA, it is not necessary that a plaintiff actually seek restitution in his or her claim under the Act.

¹ Magruder suggests in his memorandum that “[t]here are no cases supporting Defendant’s use of the UTPA” to redress “individual private tortious conduct.” This argument is not developed, however. Magruder has focused his attack on the lack of an available remedy other than restitution, and the Court will similarly focus its analysis on that argument.

Sawyer's claim under the UTPA in Count II of the Counterclaim should not be dismissed.

Conclusion

For the foregoing reasons, I hereby recommend Plaintiff/Counterclaim Defendant Magruder's Motion to Dismiss Counts I and II of the Counterclaim be DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu

United States Magistrate Judge

Dated on: December 6, 1999